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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1113~~ 85

PLACID OIL COMPANY and LA-TERRE CO., INC.,
Petitioners,

v.

UNION PRODUCING COMPANY and TEXAS GULF PRODUCING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana and/or to the Court of Appeal, First Circuit, State of Louisiana

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana and/or to the Court of Appeal, First Circuit, State of Louisiana

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JOINT BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are referred to in the Petition.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3). However, this Court lacks jurisdiction because the case does not involve a substantial federal question and the judgment sought to be reviewed is based on an adequate and independent non-federal ground; and, in any event, a federal question was not raised and preserved in the Courts below.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioners' statement of the question presented is incorrect and would attempt to inject a federal question. The Court of Appeal, in the construction of an oil and gas lease description calling for the North 200 acres of Section 13, Township 20 South, Range 17 East, and North 400 acres of Section 110, Township 20 South, Range 18 East, found that the parties to the lease intended that 600 acres of land in the two sections would be covered by the lease and intended that the boundary between the two sections would be the range line established in 1831 by Foster and Walker and approved in 1832 by the Surveyor General. Thus, judgment ordering the land to be so located on the ground was rendered. The questions presented are:

(1) Whether the state court's factual determinations involved a substantial federal question;

(2) Whether the state court judgment was based on an adequate and independent non-federal ground; and

(3) Whether petitioners raised and preserved in the state courts the federal question which they contend is presented, if the federal claim and the grounds therefor were not pleaded as a special or affirmative defense, as required by state law, but to which only vague reference was made in oral argument before the District Court, in a brief on appeal and in an application to the highest state court for certiorari, or writ of review, which application was denied without opinion.

STATUTE PRESENTED

It is submitted that none of the seven statutes printed in Appendix A of the Petition is involved.

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case is incorrect and would attempt to inject a federal question. On June 21, 1948, La-Terre[1] as lessor, granted to Union, [2] as lessee, an oil and gas lease covering 18,056 acres of land in Lafourche and Terrebonne Parishes, Louisiana (C-6, Stip.). Included among the lands situated in Terrebonne Parish, Louisiana, was land described in the lease as:

> All of Section 13 (except W½ of SW¼), containing 560 acres, Township 20 South, Range 17 East, and all of Section 110, containing 612.84 acres, Township 20 South, Range 18 East.

In accordance with the provisions of the lease, Union, by instrument dated August 24, 1949, selected for lease continuation 4,456.84 acres of the land described in the lease, for which it paid to La-Terre $10.00 per acre, or $44,568.40, as required under the lease. (Tr. 69; C-8, Stip.) Included in this selected acreage was land described in the instrument as:

> North 200 acres of Section 13, containing 200 acres, Township 20 South, Range 17 East, and North 400

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(1) La-Terre Co., Inc., one of the defendants in the state court, is herein referred to as "La-Terre."

(2) Union Producing Company, one of the plaintiffs in the state court, is herein referred to as "Union."

acres of Section 110, containing 400 acres, Township 20 South, Range 18 East.

Texas Gulf[3] acquired from Union one-half of its lease in 1950 (C-9, Stip.), and, commencing in June, 1951, they drilled and completed as commercial producers five gas and condensate wells on land under their lease, for which La-Terre received royalty.

Just prior to March of 1960, Union and Texas Gulf had made a survey on the ground of Sections 13 and 110 and for the first time learned for a fact that the governmental survey of Section 13 and two governmental surveys of Section 110 did not conform and harmonize but actually overlapped each other for a distance of approximately 3,000 feet. (P-3, P-3a, P-4; Tr. 71, 82 108, 109)

The overlap was brought about by different locations of the range line between Ranges 18 and 17 East pursuant to a survey of Township 20 South, Range 18 East, by Foster and Walker, Surveyors, made in 1831, and approved in 1832 by the Surveyor General; a resurvey or recheck of the Foster and Walker survey by Gorlinski, Surveyor, made in 1855 and approved in 1856 (wherein he moved the west boundary or range line of Township 20 South, Range 18 East, as established by Foster and Walker); and a partial survey of Township 20 South, Range 17 East, by Connelly, Surveyor, made in 1837 and approved in 1842 (wherein he placed the east

(3) Texas Gulf Producing Company, the other plaintiff in the state court, is herein referred to as "Texas Gulf."

boundary or range line of Township 20 South, Range 17 East, some 3000 feet farther to the east than the Gorlinski and Foster and Walker surveys, measured from the location of the range line at the Northwest corner of Township 20 South, Range 18 East), notwithstanding the then existing 1831 survey by Foster and Walker.[4] (A-1, A-2, A-4, A-5, A-8, A-9, Stip.; P-2, P-3a, P-4; Tr. 15-32, 200, 206, 207, 214, 246, 249-257 and 260-263.)

The plat reproduced in the Opinion of the Court below (178 So.2d at p. 394),[5] clearly shows the location of the three range lines. The four charts attached to the Petition also illustrate the location of the three range lines, although Chart 4 is misleading, as the range line shown and referred to thereon by petitioners as "'Corrected' Common Boundary of Federal Townships, Drawn by Louisiana Court of Appeal," is, in fact, the range line established in 1831 by Foster and Walker and approved in 1832 by the Surveyor General. It is also the range line which, the Court of Appeal found, the parties to the lease intended as the boundary between Sections 13 and 110.

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(4) The location of the Northwest Corner of Township 20 South, Range 18 East, was identical in the Foster and Walker survey and the resurvey by Gorlinski. From this point, however, the Foster and Walker survey veered south four degrees while the Gorlinski resurvey was run due south from the Northwest Corner and resulted in a distance between the location of the Southeast Corner according to the Foster and Walker survey and the resurvey by Gorlinski of Township 20 South, Range 18 East, of approximately 27 chains.

(5) Appendix B of the Petition, p. 21b.

Prior to the final completion of an oil and gas lease which La-Terre granted to Placid[6] in March of 1960, La-Terre, being fully aware of the overlap and not knowing exactly where the southern boundary of the lease owned by Union and Texas Gulf might be placed, considered the matter thoroughly before deciding upon the description to be placed in Placid's lease. (P-11-P-38).

Accordingly, on March 30, 1960, La-Terre granted to Placid the oil and gas lease covering, among other lands, all of the property in Sections 13 (except W½ of SW¼) and 110, except the property in those two sections covered and affected by the Union-Texas Gulf lease.

The description in the Placid lease thus makes the location of the North boundary of Placid's lease completely dependent on the location of the South boundary of the North 200 acres of Section 13 and the North 400 acres of Section 110, as described in the Union-Texas Gulf lease.

Union and Texas Gulf informed Placid and put it on notice, shortly after Placid took out a permit to drill its first well, that they would assert all of their legal rights in the event that it was determined that a well was drilled by Placid on land covered by the Union-Texas Gulf lease. (P-44; Tr. 149, 150).

This declaratory judgment action was brought by respondents to have the Court determine the location on the ground of the 600 acres in Sections 13 and 110 which they contended was covered by their lease, after it became

(6) Placid Oil Company, the other defendant in the state court, is herein referred to as "Placid."

apparent that the parties could not agree on the ground location. La-Terre took the side of Placid, as it was entitled to a larger royalty under the Placid lease. (5(B), Stip.)

The District Court interpreted the descriptions of the land in the two sections covered by the Union-Texas Gulf lease according to the construction placed on the description by La-Terre and Placid.

The Court of Appeal reversed the District Court's judgment and, in its construction of the description in the lease contract, found that the parties to the lease contract intended that 600 acres of land in the two sections would be covered by the lease; and intended that the boundary between the two sections would be the 1831 Foster and Walker range line. In other words, the Court found from all the evidence that La-Terre did not intend to sell, and Union and Texas Gulf did not intend to buy, an "overlap" or the same land twice..

The finding of fact that 600 acres in the two sections were covered by the lease was based on the Court's determination that the selection instrument description, North 200 acres of Section 13 and North 400 acres of Section 110, was a "definite" description, that "The acreage cannot be ignored," and that the description "is perfectly understandable, nothing ambiguous per se, it is couched in simple language and is not a weak description but a strong one and there would be no problem whatsoever for a surveyor to locate the land therein described on the ground if Section 13, Township 20 South, Range

17 East and Section 110, Township 20 South, Range 18 East had no overlap lines, but one range line which served as a common boundary between them," (178 So.2d at pp. 401, 402).[7] The Court considered, but rejected, petitioners' factual contention that Union, at the date of the selection, had knowledge of the overlap "and therefore they knew or are charged wth knowledge that the land described in Sections 13 and 110 did not contain 600 acres and they did not intend to select 600 acres." (178 So.2d at p. 399)[8]

Because it "would not settle in any manner the conflict now before the court," the Court also disregarded surveyors' testimony that "they would accept the boundaries of Sections 13 and 110 as surveyed and approved by government surveyors which would include the acceptance of the overlapping surveys of Sections 13 and 110 and would be placing the same land within the overlap in both Section 13 and Section 110." (178 So.2d at p. 402)[9]

Then the Court soundly deduced from the evidence that a boundary between Sections 13 and 110 had to be located on the ground before the 600 acres (and, for that matter, the boundary, between the Union-Texas Gulf lease and the Placid lease) could be so located, as follows:

> ". . . Nothing is accomplished which would result in an answer to the question posed in this case by ac-

(7) Appendix B of the Petition, pp. 35b, 36b.

(8) Appendix B of the Petition, p. 29b.

(9) Appendix B of the Petition, p. 37b.

cepting Section 13 and Section 110 as containing acreage common to both but treating the common acreage as if it were only contained in one of the sections when it was surveyed and then the other when it was surveyed." (178 So.2d at p. 403) (10)

* * *

". . . A decision must be reached which fixes the location of the east boundary, or range line, of Township 20 South, Range 17 East and of Township 20 South, Range 18 East, this range line to be the common boundary between these two ranges in Township 20. It is only then that the land leased to Union can be definitely located, thus establishing the south boundary which in turn will identify and locate on the ground the lands leased to Placid." (178 So.2d at pp. 406, 407) (11)

Buttressing the Court's decision on this point was the testimony of a licensed Louisiana Civil Engineer, to the effect that *no one* can locate the land described in the lease until the Court determined the boundary separating the two sections (178 So.2d at p. 403). (12)

The Court's finding, that the parties to the contract intended that the boundary between the two sections would be the Foster and Walker range line, was based on its presumption that the parties intended to locate on the ground a boundary between the two sections which would yield 600 acres in the two sections and which boundary the Court was of the opinion would be control-

(10) Appendix B of the Petition, pp. 37b, 38b.

(11) Appendix B of the Petition, p. 46b.

(12) Appendix B of the Petition, pp. 38b, 39b.

ling in the absence of such an agreement. From this, the Court found that the Foster and Walker range line, being the one first established and approved, would accomplish both purposes.

The Court of Appeal did not order any resurvey or revise or remake any U. S. Survey, but, as between conflicting surveys, simply determined the U. S. Survey which was applicable to the title dispute.

Therefore, the Court of Appeal ordered that the 600 acres be located on the ground in accordance with the plat reproduced in its opinion (178 So.2d at p. 411).[13] As incidental relief, it further ordered that Union and Texas Gulf be recognized as owners of a well drilled on this 600 acres and that Placid account and remit to the owners for all oil, gas and other minerals produced therefrom.

After an application for rehearing was denied by the Court of Appeal, the Louisiana Supreme Court denied an application by La-Terre and Placid for certiorari, or writ of review, with the following statement:

> "According to the facts of the case, as found to be by the Court of Appeal, the result reached by the Court is correct." (248 La. 447, 179 So.2d 432).[14]

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(13) Appendix B of the Petition, p. 56b.

(14) Appendix B of the Petition, p. 59b.

ARGUMENT

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW INVOLVED.

The narrow questions of fact presented here are of small consequence to all except the parties to this litigation, even though petitioners would attempt to convince this Court that such questions have broad implications and justify review.

In determining what the Court below actually did, petitioners did not consider the questions presented by the pleadings which were necessary to the Court's decision or the judgment which it rendered. To do so would have clearly shown the lack of a federal question, as well as the existence of an adequate and independent state ground.

Instead, petitioners erroneously told this Court that respondents "petitioned the Louisiana Court to upset the Federal boundaries of the sections selected under the 1948 lease and draw new boundaries." (Petition, p. 8) This is simply not correct. Respondents merely asked for a declaration that "600 acres of land" in the two sections were "covered and affected by the oil, gas and mineral lease" and that the 600 acres "be located on the ground." Nowhere have respondents "petitioned to upset boundaries or draw new boundaries," and a conclusion to the contrary is ill-founded.

Petitioners erroneously charge the Court of Appeal with rendering a judgment which "upset the Federal

boundaries of both townships" and which " 'ordered, adjudged and decreed' a new boundary line in accordance with what it conceived to be the Old Foster and Walker survey—and held that Union and Texas Gulf had the right to the oil royalties from Placid's well B-1." Further, they charge that the purpose and effect of the judgment was to "establish 'the legal bounds of the two sections involved.' " (Petition, pp. 9, 10). The unambiguous judgment can not be so interpreted. The Court held that Union and Texas Gulf had a right to all *oil, gas, and other minerals* (and not just *oil royalties* produced from the *B-2* and not the *B-1) well.* The judgment also decreed that the land in the two sections described in and covered by the lease "be located on the ground" in accordance with a certain plat so as to contain 600 acres (178 So.2d at pp. 410-412).(15) Such distortions of the judgment by petitioners cannot be relied upon to throw on this Court a so-called federal question. Petitioners would have this Court ignore the *judgment* of the Court below, but this Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn,* 324 U.S. 117, 125-6 (1944).

In an apparent attempt to impress this Court with the importance of this case as affecting matters beyond those here involved, petitioners went far beyond the record in stating that Placid "brought in three valuable wells, including well B-1, at a depth of over 15,000 feet, and at a total cost of over $1,000,000" (Petition, p. 8); and that "we have also examined the private Tobin survey

(15) Appendix B of the Petition, pp. 55b-58b.

services used by the oil and gas industry throughout southern Louisiana and have identified almost three dozen areas of overlaps or other incongruities in the Gulf Coast area alone which could from all appearances generate private litigation to 'correct' old Federal boundaries." (Petition, pp. 14, 15). Such factors, even if supported by evidence, are not sufficient by themselves to justify review by this Court.

Petitioners also read into *Cragin v. Powell*, 128 U.S. 691 (1888), certain determinations which were not made in that case and suggest that it decided a federal question and "upheld" the same approved survey which, petitioners charge, the Court of Appeal held " 'was unauthorized and legally without any effect . . .' and 'erroneous and illegal.' " (Petition, pp. 6, 7, 9, 11-13). In the first place, in that case, a "Louisiana State Court" never attempted to "upset the official Connelly survey" and "redraw the boundaries of 17 to conform with the adjacent Gorlinski boundary of 18," nor did such a court appoint "a court surveyor for the purpose." (Petition, pp. 6, 7). The case, although originally brought in a Louisiana State Court, was removed to and kept by a federal district court on grounds of diversity of citizenship, and this Court had it on appeal from a decision of that Court. A surveyor appointed by the Court proceeded to run a line which he considered the proper boundary between the lands in dispute and recommended its adoption to the Court "as substantially such a line as would have been run had the whole township been resurveyed at the time when Deputy-Surveyor Gorlinski was resurveying the adjoining town-

ships." This case was placed on the equity side of the docket, because this boundary would have the effect of ejecting Cragin from "the rich ridges along the bayous now in the possession of the latter." This Court stated that this brought within the Court's "equitable cognizance the essential rights of the parties, unaffected by the special limitations governing the action of boundary," and the case was tried in equity. The district court adopted the boundary so run and Cragin appealed to this Court. This Court reversed and simply held that Powell either did not intend to get Cragin's land or he was to be considered as a man watching for the accidental mistakes of others and preparing to take advantage of them, saying, "An advantage thus obtained, a court of equity will not readily enforce." Therefore, language in the case to the effect that generally the land office, and not the court, should supervise and carry out governmental surveys is obiter dictum. Even if this general statement of the law applied to this case, which is denied, this Court was careful to point out that it was "subject to necessary and decided limitations" and proceeded to discuss such limitations. Therefore, contrary to petitioners' assertions, this Court did not approve the Gorlinski survey in *Cragin v. Powell.*

As the judgment of the Court below was based upon an analysis of the particular findings of fact involved, and upon the construction of the particular contracts involved solely between private parties to the contract, this Court should not exert its jurisdiction merely to review the decision. "We do not grant a certiorari to

review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1924). See also: *Black v. Cutter Laboratories*, 351 U.S. 292, 299 (1956).

La-Terre and Placid refer to seven statutes printed in Appendix A of the Petition as being involved, but they fail to show how the statutes are ever drawn into question in the case. Even so, it is not enough to show that petitioners' claim is dependent on an act of Congress or that the claim has its origin in a patent of the United States or that the land was described by governmental subdivisions. Petitioners must prove to this Court's satisfaction that "the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States; that the suit, in whole or in part, arose out of such controversy, or that a decision of the case depended upon such construction." *Huckins v. Duval County, Florida*, 286 F. 2d 46 (5th Cir. 1960), cert den. 366 U.S. 945; *Kirklin v. Ellerbe*, 278 F. 168 (5th Cir. 1922). No such proof has even been offered.

This Court denied certiorari in *Huckins v. Duval County, Florida*, supra. There, the Court held that there existed no federal question, although, conceding that the answer to the question concerning one of conflicting claims which resulted from two overlapping governmental surveys as to the boundaries of land embraced within a Spanish grant may involve "a construction of the grant, a determination of the consequences of the proceedings held and the action taken by the Commissioners, a decision

as to the validity of the patent to the State of Florida, or *an ascertaining of the effect of the Government surveys.*" *Huckins v. Duval County, Florida*, 286 F.2d 46, at p. 49 (Emphasis added). Thus, even if there were other questions besides interpretation of the Union-Texas Gulf lease in this case, the *Huckins* case would still be conclusive that no federal question is presented in this case.

This Court also refused a writ in *Lanfear v. Hunley*, 71 U.S. 325 (1866), to review a Louisiana Supreme Court judgment determining the location of the eastern boundary of a Spanish grant as surveyed by a U. S. Deputy Surveyor in 1854, which overlapped land occupied and claimed by defendant by right of preemption. The Court said the controversy turned wholly upon the question of locality of the boundary, and, going on, made the following statement:

> ". . . This court has repeatedly held, that it does not warrant the review of an adjudication upon a mere question of boundary. The fact that the land to which the boundary relates is held by a title derived from an act of Congress does not change the result. If the title be admitted as recognized by the act, its location upon the land is a subject wholly within the cognizance of the state tribunals, and it is not within the power of this court to revise their action." *Lanfear v. Hunley*, 71 U.S. 325, at p. 326.

The *Lanfear* case is similar in many respects to this case and establishes the lack of a federal question here. See also *Almonester v. Kenton*, 50 U.S. 1 (1850).

The case of *Graham v. Gill*, 223 U.S. 648 (1911), cited by petitioners, involved the requirements of a federal statute "as to the mode of surveying public lands" and, therefore, has no application here. As the Court of Appeal said in this case below, "We are not confronted with a surveying problem, but a judicial one." 178 So.2d at pp. 402, 403. No question was presented in this case in any of the courts below concerning the identification of the precise location of the three range lines. All parties agreed as to the location of the three range lines located according to the plat and field notes of the surveyors involved. On the other hand, in the *Gill* case, the question presented involved the interpretation of field notes of government surveyors and other evidence in order to identify the precise location of the tract in dispute according to the surveys. That was the sole question presented. In the *Gill* case, the government sold plaintiffs an island (lot 1, section 8), which was surveyed by continuing a survey made from land lying east thereof, and sold defendant an island (lot 2, section 17), which was surveyed by continuing a survey made from lands lying west of the island. By using the field notes of the respective surveys, it appeared that the island in defendant's possession was the one sold to plaintiff. Defendant sought to introduce at the trial evidence of the *physical location* of his tract with reference to other land in the vicinity, shown on the plat of survey. Plaintiffs objected to the admission of all evidence bearing upon the *location* of the tract other than the field notes of the survey under which they claimed, being the best and only evidence. The trial court overruled the objection and held that defendant's evidence con-

clusively established that the tract in possession of defendant was lot 2, section 17, as delineated on the plat, according to which the land was patented to defendant, which was affirmed by the Florida Supreme Court. This Court affirmed the trial court, but, in doing so, stated that the trial court's ruling involved a federal question. Furthermore, the *Gill* case involved a question of what the government sold the parties, and not, as here, what land private parties intended to lease by their private contract.

II

THE JUDGMENT OF THE STATE COURT WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The State Court judgment is, in fact, based upon a non-federal ground which is adequate to support the judgment without consideration of a federal question. The State Court merely construed and interpreted private contracts, being the lease and selection instrument between La-Terre and Union, and recognized a boundary between Sections 13 and 110, which the court found was one which the parties intended to recognize by their contracts. The judgment based thereon could have had no other effect. The Court of Appeal did not pass on, or even consider, any federal questions, no federal statutes having been referred to and numerous state court authorities having been relied upon for its Opinion.

Therefore, inasmuch as no federal questions were presented to or decided by the court below, this Court

has no jurisdiction. But even if it were otherwise, this Court will not pass on federal questions "where it appears that the judgment rests on adequate state grounds." *Black v. Cutter Laboratories,* supra. Construction of a local contract by a state court under local law certainly presents an independent state ground. *Black v. Cutter Laboratories,* supra.

The court below did not "void" or even purport to void any Federal Township boundaries, or "fix" new ones, contrary to petitioners' assertions. The three range lines which were surveyed by the Federal Government still exist on the ground today in the place where all parties to this suit have agreed, by their surveyors' testimony, they are located. One or perhaps all of them may be used in the future by other parties in their contracts affecting land in the area, and, as here, a court may be presented in the future with the construction of such a contract to determine which range line the parties intended to recognize as a boundary in their descriptions. It would only be natural if this occurred.

This Court refused to grant a writ to review a Lousiana Supreme Court decision in *White v. Leovy,* 174 U.S. 91 (1899), in which the controversy concerned the location of certain swamp and overflowed lands according to "an official plat or survey made by G. F. Connelly in 1836." Plaintiff claimed the land by an 1890 patent. Defendant claimed the land by an 1893 patent. Plaintiff claimed in the state court that the governmental survey referred to in his patent could not "be questioned or im-

peached by the defendant, and this court is wholly without jurisdiction to determine whether same is or not erroneous, and that the said patent cannot be questioned or impeached by the defendant for fraud or error." The state court determined the question adversely to plaintiff, based entirely on a construction of the land descriptions in the patents. In denying a review, this Court stated as follows:

> "It is manifest no federal question was passed on by the court. Its decision was put upon an independent ground, involving no federal question, and of itself sufficient to support the judgment. It merely determined the extent of the grant to the state, and, interpreting the contending patents as conveyances, decided that the lands described in that of plaintiff did not embrace the lands in controversy, and that the lands described in that of defendant did embrace them. This was but the interpretation of written instruments, and, if it were even apparent to us to be wrong, — which we cannot say, — we should nevertheless be without power to review it."

The *White* case does not differ in any material respect from this case and should set at rest the matter of an adequate and independent state ground. See, also, *Clark on Surveying and Boundaries* (3rd ed. 1959), § 38 on "Boundaries, a question of state law," pages 46, 47, to the effect that, after the federal government disposed of the public domain, the questions with respect to the matter of boundaries established by government surveys are strictly a matter of state law.

III

PETITIONERS FAILED TO RAISE AND PRESERVE A FEDERAL QUESTION IN THE STATE COURTS.

The jurisdictional requirement relative to the raising of a substantial federal question under subsection (3) of § 1257 is that the validity of a statute must have been "drawn in question," or a federal title, right, privilege or immunity must have been "specially set up or claimed." This petitioners have not done.

Furthermore, the federal claim and the grounds therefor must be brought to the state court's attention with fair precision. As stated by this Court in *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right." Nowhere in the record of this case has this requirement been met.

La-Terre and Placid have urged to this Court, erroneously, we believe, as indicated hereinabove, that Union and Texas Gulf "petitioned The Louisiana Court to upset the Federal boundaries" and "draw new boundaries." Assuming, arguendo, that such a petition was made or that such was the effect of their petition, La-Terre and Placid did not set up or plead as a special and affirmative defense in their answer that such action would violate federal law, as they are doing at this late stage of the

proceedings. By analogy, a plea of unconstitutionality of a statute in Louisiana is a special and affirmative defense which must be specially pleaded, and it cannot be urged for the first time in an appellate court. *Long v. Northeast Soil Conservation District of Louisiana*, 226 La. 824, 77 So. 2d 408 (1955). This Court recognizes that a state "may attach reasonable limitations to the assertion of federal constitutional rights" and such limitations must be respected. *Michel v. Louisiana*, 350 U.S. 91, 97 (1955). Thus, it is our contention that petitioners' failure to follow state procedure is fatal to their chance for review by this Court. *In re Lampkin*, 355 U.S. 59 (1957); *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961)

Inadequate to raise and preserve a federal question was the oral argument made by counsel for petitioners at the trial of this case regarding *Cragin v. Powell*, supra, upon which petitioners rely. (Petition, p. 10, footnote 4) *Live Oak Water Users' Ass'n v. Railroad Commission*, 269 U.S. 354, 357-358 (1925); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934).

Petitioners also rely on general statements made on pages 11 through 17 of their Brief on Appeal to the Court of Appeal, regarding *state court* authorities, *Cragin v. Powell*, supra, and a surveyor's manual (Petition p. 10, footnote 4), but without reference to any federal statutes. This clearly is insufficient, even if they had properly raised a federal question in the trial court, which they did not. This Court has consistently held that the federal question must be raised on the record, and

the briefs are no part of the record for that purpose. E.g., *Lynch v. New York ex rel. Pierson*, supra; *Live Oak Water Users' Ass'n v. Railroad Commission*, supra; *Harding v. Illinois*, 196 U.S. 78, 84 (1904).

As the argument in a brief does not supply the deficiency of not raising the federal question in the actual record, and since the guiding principle of law is that the state court must have had an opportunity to pass on the federal question, it is too late to raise that question for the first time in a petition for certiorari. U. S. Supreme Court Rule 23. And see generally, in support of the text, *White River Lumber Co. v. Arkansas*, 279 U.S. 692, 699-700 (1928); *Whitney v. California*, 274 U.S. 357, 362-363 (1926); *Thomas v. Iowa*, 209 U.S. 258 (1907).

Again, petitioners rely on a vague statement in their application to the Louisiana Supreme Court for a writ of certiorari, or review, which was denied without an opinion, to establish that they raised a federal question. Even if, in their Louisiana Supreme Court applications, they had "drawn into question" the validity of a statute or "specifically set up or claimed" a federal title, right, privilege or immunity, which they did not do, this would be insufficient unless that Court had actually entertained the petition and expressly decided the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-244 (1958).

Thus, petitioners have waived any federal issue and there is no basis for the assertion of this Court's jurisdiction.

CONCLUSION

Since we believe this Court will not reach the merits of this case and will find it has no jurisdiction to review the matter, no discussion of the well considered decision below, in addition to what has already been presented in stating the case, appears appropriate.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,,

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